Federal Court  Cour fédérale

Date: 20171201

Docket: IMM-1234-17

Citation: 2017 FC 1091

Ottawa, Ontario, December 1, 2017

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

ABSHIR BARRE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Abshir Barre brings this application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. He seeks review of the February 6, 2017 decision of the Minister's Delegate [Delegate] refusing his request to reopen and reconsider a June 2012 determination that he posed a danger to the Canadian public and that his removal to Somalia would not place him at risk [the Danger Opinion].

[2] Mr. Barre submits that the Delegate breached the principles of procedural fairness by not providing notice that a decision was imminent. He submits that a heightened duty of fairness applies to the request to reopen and reconsider the Danger Opinion. He submits that the failure of the Delegate to provide notice of an imminent decision resulted in the exclusion of relevant evidence relating to whether he poses a danger to the Canadian public and the nature of the risk he faces upon return to Somalia. He now seeks to place that evidence before this Court. Mr. Barre asks that the Delegate's decision be set aside and the matter returned for redetermination by a different decision-maker.

[3] For the reasons set out in greater detail below, I am not convinced that the Delegate had a duty to solicit updated submissions from Mr. Barre or to provide advance notice of a pending decision. I am therefore unable to find there was a breach of procedural fairness. The application is denied.

[4] My finding that there was no duty to solicit further submissions from Mr. Barre is determinative of this application. I have therefore not addressed the admissibility of fresh evidence relating to Mr. Barre's rehabilitation and recovery or country conditions in Somalia.

II. Style of Cause

[5] The Applicant has named the Minister of Immigration, Refugees and Citizenship Canada as the Respondent in this matter. The correct Respondent is the Minister of Citizenship and Immigration (*Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, s 5(2)(b) and IRPA, s 4(1)). Accordingly, the Respondent in the style of cause is amended,

removing the Minister of Immigration, Refugees and Citizenship as Respondent, and naming the Minister of Citizenship and Immigration as Respondent (*Federal Courts Rules*, SOR/98-106, r 76(a)).

III. Background

[6] Mr. Barre left Somalia at the age of 11 and arrived in Canada, by way of at least Kenya and the United States, on December 4, 1992 with his mother and three siblings (2 sisters and 1 brother). He was granted Convention Refugee status.

[7] Mr. Barre has a record of criminal convictions spanning from 1998 to 2011 which include assault causing bodily harm contrary to paragraph 267(b) of the *Criminal Code*, RSC 1985, c C-46, and aggravated assault contrary to section 268 of the *Criminal Code*. The convictions have resulted in: inadmissibility reports pursuant to IRPA; a deportation order; and numerous periods of immigration detention, the most recent following the completion of a sentence imposed in July 2011 after he was convicted on a charge of robbery contrary to paragraph 334(1)(b) of the *Criminal Code*.

[8] He has stated that his family had been wealthy and politically prominent in Somalia and that his brother was killed when he returned to Somalia and tried to reclaim some of the family's former property. Mr. Barre submits that the following factors all place him at risk if he were returned to Somalia: his brother's death; his family's past wealth and political involvement; his lack of knowledge of Somalia, its clan systems and language (he is only able to speak some of

the language); that Al Shabaab may kill him as an outsider; and that as a westerner he would be targeted.

[9] In June 2012, the Danger Opinion found that Mr. Barre was a danger to the public pursuant to paragraph 115(2)(a) of IRPA. The Danger Opinion then concluded that prospects for rehabilitation and reintegration of Mr. Barre were not sufficient to mitigate the risk he posed to Canadian society. The Danger Opinion further concluded that Mr. Barre would not, on a balance of probabilities, be exposed to individualized risk to life, risk to torture or risk of cruel and unusual treatment or punishment, or to more than a mere possibility of persecution if returned to Somalia.

[10] The Danger Opinion permitted Mr. Barre's removal to Somalia despite his Convention Refugee status. An application for leave and judicial review of the Danger Opinion was initiated. Leave was denied by this Court.

[11] The record indicates that the Respondent sought to return Mr. Barre to Somalia subsequent to the issuance of the Danger Opinion. Those efforts were unsuccessful due, at least in part, to Mr. Barre's refusal to cooperate in the removal process.

[12] In April 2014, Mr. Barre requested that the Danger Opinion be reopened and reconsidered. In August 2016, Mr. Barre was released from immigration detention under supervision following a detention review hearing in July 2016.

IV. Decision under Review: The Reopening & Reconsideration Request

[13] In seeking a reopening and reconsideration of the Danger Opinion, Mr. Barre's counsel relied on the passage of time, the dated nature of his criminality, the absence of a section 7 *Charter* analysis in the Danger Opinion, evidence of personalized and heightened risk in Somalia and Humanitarian and Compassionate [H&C] considerations. In concluding the written submissions Mr. Barre's counsel writes:

> We further ask that if you have concern on any of the issues raised herein, that you notify our offices so that we may attempt to respond to them in kind. We will be submitting further information, and would respectfully request 30 days' notice if your office is prepared to make a decision in this matter.

[14] A decision refusing the request was rendered on February 6, 2017, almost three years after the original request was made. Mr. Barre received no advance notice that a decision was to be rendered on the request.

[15] The Delegate found that evidence of rehabilitation was limited and that the evidence indicated an improvement in conditions in Somalia. The Delegate further found that the *Charter* concern raised was a matter that this Court would have considered in refusing judicial review of the Danger Opinion, and that the H&C factors identified were unlikely, on their own, to change the outcome of the Danger Opinion. The request to reopen and reconsider was denied.

V. Standard of Review

[16] The Parties do not dispute that on issues of procedural fairness the correctness standard applies, a decision-maker is entitled to no deference (*Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] 1 SCR 339 [*Khosa*]; *A N v Canada (Citizenship and Immigration)*, 2016 FC 549 at 19, 42 Imm LR (4th) 5).

[17] When proceeding on a correctness review of procedural fairness "[t]he Court must determine whether the duty to act fairly has been satisfied within the specific context of the matter before the Court" (*Johnson v Canada (Citizenship and Immigration)*, 2017 FC 550 at para 10, 280 ACWS (3d) 374 [*Johnson*] citing *Baker v Canada (Citizenship and Immigration)*, [1999] 2 SCR 817 at para 21, 174 DLR (4th) 193 [*Baker*]). This customized analysis is required as "[t]he duty of fairness varies and depends upon an appreciation of the context in which the issue arises" (*Johnson ibid* at para 13 citing: *Baker ibid* at para 21; and *Ha v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 49 at para 40, [2004] 3 FCR 195).

VI. Analysis

[18] Mr. Barre submits that on the facts of this case the Delegate was required to advise that a decision was imminent and provide him an opportunity to update his submissions. In advancing this position he relies on *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at paragraph 115, [2002] 1 SCR 3, citing paragraphs 23-27 of *Baker* which sets out the non-

exhaustive factors a Court is to consider in determining the scope of procedural fairness in a given situation.

[19] He submits that the jurisprudence has recognized the duty of fairness is high in the context of a danger opinion where the outcome is possible *refoulement* to torture or other mistreatment (*Canada (Minister of Citizenship and Immigration) v Bhagwandass*, 2001 FCA 49 at paras 30-31, [2001] 3 FCR 3). Mr. Barre acknowledges that the decision under review is not a danger opinion but argues the same interests are engaged and therefore a similar high duty of fairness arises. He further argues that the passage of time between the request being made and the decision rendered placed a higher onus on the Delegate to give some notice of the impending decision. In this regard he highlights that: (1) he is subject to removal to a particularly dangerous environment; (2) the Delegate should have been aware that he had been released from detention, a material change in his circumstances; and (3) that he had specifically advised in his 2014 submissions that further information would be submitted and notice of a pending decision was requested.

[20] It is well-established in the IRPA context that the onus is on an applicant to provide all material in support of an application. A decision-maker does not have a duty or obligation to seek out additional information and an applicant who does not provide information or fails to update an application as circumstances evolve does so at his or her own peril (*Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 8, [2004] 2 FCR 635; *Zhu v Canada (Citizenship and Immigration)*, 2011 FC 952 at paragraph 20, 206 ACWS (3d) 178; *Bellido v Canada (Minister of Citizenship and Immigration)*, 2005 FC 452 at para 35, 138

ACWS (3d) 728; *Nehme v Canada (Minister of Citizenship and Immigration)*, 2004 FC 64 at para 18, 245 FTR 139; *Bernard v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1068 at paras 23-24, 108 ACWS (3d) 1040; *Prasad v Canada (Minister of Citizenship and Immigration)* (1996), 34 Imm LR (2d) 91, *Ahn v Canada (Minister of Citizenship & Immigration)* (1999), 166 FTR 139, 1999 CanLII 7929 at paras 14-16 (FCTD), *Lam v Canada (Minister of Citizenship and Immigration)*, 152 FTR 316, 1998 CanLII 8315 at para 4 (FCTD) *Arumugam v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 985 at para 17, 211 FTR 65).

[21] An applicant cannot, in my opinion, shift the onus to a decision-maker to determine if there has been a change in circumstances or to seek out updated information by advising that "[w]e will be submitting further information, and would respectfully request 30 days' notice if your office is prepared to make a decision in this matter." While an applicant is certainly capable of requesting prior notification, this does not mean the request will be granted; the obligation remains with the applicant to put their best foot forward. In considering the issue of fairness owed, I note that Mr. Barre was well aware of the change in circumstances arising from his release from detention and to assess whether that change was material. Mr. Barre was also aware that his request to reopen and reconsider the Danger Opinion was outstanding. As such Mr. Barre was well-positioned to place information before the Delegate relating to his changed circumstances. The Delegate was not obligated to seek out any such information.

[22] Similarly, information relating to country conditions was information Mr. Barre was in a position to place before the Delegate. In fact Mr. Barre expressly indicated he would be

submitting further information, yet there is no indication on the record that any further information was ever submitted. The record does not indicate that the Respondent's conduct gave rise to an expectation that a decision would not be rendered before further information was provided or that notice of an imminent decision would be provided. The Respondent was silent in respect of Mr. Barres's request for notice. Silence cannot be a basis upon which to conclude a duty has been assumed or an expectation created. I would also note that despite Mr. Barre's failure to provide further or updated information, the decision reflects the fact that the Delegate did consider commonly available updated country condition evidence.

[23] While I am not convinced that a request to reopen and reconsider a danger opinion attracts the same high standard of fairness that is engaged by the original danger opinion procedure, the question does not arise here. Mr. Barre's onus to show, on a *prima facie* basis, that there has been a material change in circumstances warranting reassessment remains, regardless of where on the spectrum the duty of fairness ultimately rests when one considers the *Baker* factors. The Delegate concluded Mr. Barre had not demonstrated a material change in circumstances and Mr. Barre has not taken issue with the reasonableness of that conclusion based on the evidence that was before the Delegate.

VII. Conclusion

[24] The application is dismissed. The Parties have not identified a question of general importance for certification and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. The style of cause is amended, removing The Minister of Immigration, Refugees and Citizenship as Respondent, and naming The Minister of Citizenship and Immigration as Respondent; and

3. No question is certified.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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